



POLICE DEPARTMENT

September 19, 2019

In the Matter of the Charges and Specifications

Case Nos.

- against -

Police Officer Maryann Lodico
Tax Registry No. 943389
105th Precinct

2018-18669

Sergeant Michael Sykora
Tax Registry No. 926188
Criminal Intel Section

2018-18668

At: Police Headquarters
 One Police Plaza
 New York, NY 10038

Before: Honorable Paul M. Gamble
 Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB: Jonathan Fogel, Esq.
 Civilian Complaint Review Board
 100 Church Street, 10th Floor
 New York, NY 10007

For Respondent Lodico: John Tynan, Esq.
 Worth, Longworth & London, LLP
 111 John Street, Suite 640
 New York, NY 10038

For Respondent Sykora: Matthew Scheiffer, Esq.
 The Quinn Law Firm
 399 Knollwood Road
 White Plains, New York

To:

HONORABLE JAMES P. O'NEILL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

CHARGES AND SPECIFICATIONS

Disciplinary Case No. 2018-18668

1. Sergeant Michael Sykora, on or about January 31, 2017, at approximately 1000 hours, while assigned to the INT CIS and on duty, in the vicinity of [REDACTED] Queens County, abused his authority as a member of the New York City Police Department, in that he participated in the entry of [REDACTED] in Queens without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT - PROHIBITED CONDUCT

2. Sergeant Michael Sykora, on or about January 31, 2017, at approximately 1000 hours, while assigned to the INT CIS and on duty, in the vicinity [REDACTED] Queens County, abused his authority as a member of the New York City Police Department, in that he participated in the entry of [REDACTED] in Queens without sufficient legal authority.¹

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT - PROHIBITED CONDUCT

3. Sergeant Michael Sykora, on or about January 31, 2017, at approximately 1000 hours, while assigned to the INT CIS and on duty, in the vicinity of [REDACTED], Queens County, abused his authority as a member of the New York City Police Department, in that he threatened to arrest Person A without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT - PROHIBITED CONDUCT

Disciplinary Case No. 2018-18669

1. Police Officer Maryann Lodico, on or about January 31, 2017, at approximately 1000 hours, while assigned to the 105th PCT and on duty, in the vicinity o [REDACTED], Queens County, abused her authority as a member of the New York City Police Department, in that she entered [REDACTED] in Queens without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT - PROHIBITED CONDUCT

2. Police Officer Maryann Lodico, on or about January 31, 2017, at approximately 1000 hours, while assigned to the 105th PCT and on duty, in the vicinity [REDACTED], Queens County, abused her authority as a member of the New York City Police Department, in that she searched [REDACTED] in Queens without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT - PROHIBITED CONDUCT

¹ As noted at trial, Specifications 1 and 2 of the Amended Charges and Specifications, dated January 28, 2019, are identical (Tr. 149-50). It is clear to the Tribunal based on the original set of Charges and Specifications, the subsequent amendment to Specification 1 and the arguments made at trial that Specification 2 was intended to charge Respondent Sykora with participation in an unlawful search. Accordingly, I have analyzed it as such below.

REPORT AND RECOMMENDATION

The above-named members of the Department appeared before me on July 29, 2019. Respondents, through their counsels, entered pleas of Not Guilty to the subject charges. The CCRB called Stephanie Forbes as a witness. Respondents testified on their own behalves. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having carefully reviewed all testimony and evidence in this matter, I find Respondents Not Guilty of the charged misconduct.

ANALYSIS

The following is a summary of the facts which are not in dispute. On January 31, 2017, Respondent Lodico was assigned as the Assistant to the Special Operations Lieutenant, 105th Precinct. Respondent Sykora was assigned to the Intelligence Division and detailed to the 105th Precinct as its Field Intelligence Officer.

From June 2016-January 2017, Respondent Lodico investigated a series of complaints of squatters, homeless encampment, garbage and narcotics use focused on [REDACTED] [REDACTED] ("the Premises"). She first went to the Premises and knocked on the door, but received no response from anyone inside. After speaking with the occupant of home to the left of the Premises, she learned that the owner of the Premises had died and that several males had later moved in. The aforementioned males allegedly left garbage outside and were selling drugs (T. 93-94).

While conducting several surveillances of the Premises during this seven-month period, Respondent Lodico observed two different males entering and exiting the Premises, which appeared to have interior illumination (T. 100). Since she learned that Con Ed workers had removed the meter at the Premises in May 2016, she suspected that the occupants had managed

to obtain electrical power through unspecified means, making use of lights and air conditioning (T. 128). She was further informed by Con Ed workers that they had attempted to enter the Premises to shut off the source of the purloined electricity, but were threatened with physical violence by persons at that address (T. 97, 100).

Respondent Lodico learned that the Premises had been purchased first by a contractor and then by T [REDACTED] who had unsuccessfully attempted to evict the persons living there. On July 6, 2016, Judge John S. Landen of the Queens County Civil Court issued an Order of Judgment with Possession (Inquest) in favor of U.S. Bank USA. The order² was served by mail upon Person A, the occupant, at 2 [REDACTED] by Certified Mail. Person A entered an appearance on January 12, 2017 by way of a Motion to Vacate the Judgment for improper service. On January 19, 2017, Judge Michael J. Pinckney of the New York City Housing Court issued an order which denied the motion to vacate and which directed Person A to depart the premises by March 19, 2017 (CCRB Ex. 2).

At approximately 1000 hours on January 31st, Respondent Lodico and her partner, Police Officer Crescimanno, went to the Premises in order to accompany Con Ed workers, with whom they had coordinated to turn off the electricity at the Premises. They waited approximately 5-10 minutes for Con Ed workers to arrive; once the Con Ed workers did appear, Respondent went to the front door with them and knocked. No one answered the door in response to almost 10 minutes of knocking. Respondent Lodico then proceeded to the next door neighbor's home to determine whether Con Ed could shut off the power to the Premises from there; she learned that

² The order was captioned "US Bank USA, National Association as Trustee for Lehman XS Trust, Series 2006-GP3, Petitioner v. [REDACTED]" (Real Name Unknown); "John" "Doe"; "Jane" "Doe," Respondents.

they could not and summoned another Con Ed truck to the location which had the ability to turn off the power from the street.

Prior to the arrival of the second Con Ed truck, Person B³ drove up to the location. Officers from the 105th Precinct Anti-crime Unit approached Person B and eventually placed him under arrest for Theft of Services. Person C emerged from the back seat of the same car and began a 10-15 minute verbal altercation with Respondent Sykora, as well as the Anti-Crime sergeant, James Reilly. After Person C "chest bumped" Respondent Sykora, she was placed under arrest. At that point, Person A⁴, who was described as a woman wearing a neck brace, emerged from inside the Premises and engaged in a heated discussion with Respondent Lodico. Another person emerged from the Premises, Person D⁵, and he too was placed under arrest for Theft of Services.

Subsequent to the three aforementioned arrests, Respondent Lodico, Respondent Sykora and Person A had a discussion regarding the entry of a Con Ed worker to cut off power to the Premises. The content of that discussion and the circumstances under which it took place are in issue.

Respondent Lodico and a Con Ed worker entered the Premises and proceeded to the basement, where they located "the box," which had formerly held the Con Ed electrical meter. An examination of "the box" revealed the presence of a "bridge," which enabled the occupants to draw electrical power from the Con Ed power source without first establishing and maintaining a

³ Person B was one of the individuals whom Respondent Lodico believed resided there and obtained electricity unlawfully, based upon the surveillance she conducted at the Premises.

⁴ When Respondent Lodico saw Person A on January 31, 2017, it was the first time she had seen her on the Premises.

⁵ Person D was the other male Respondent Lodico observed occupying the Premises during previous surveillances.

customer account. Respondent Lodico took a photograph of the unlawful "bridge" (Respondent's Exhibit A).

Respondent Lodico encountered another person occupying the basement portion of the premise who proffered receipts for rent he purportedly paid to "the brothers," Person B and Person D (T. 128-129).

Neither Respondent Sykora nor Respondent Lodico were in possession of a search warrant at the time she entered the Premises.

At issue in this case is whether Person A gave knowing and voluntary consent to permit a Con Ed worker, accompanied by Respondent Lodico, to enter the Premises for the purpose of cutting off electrical power which the occupants were obtaining and using unlawfully.

The following is a summary of the relevant evidence adduced at trial.

Respondent Lodico testified that when she first encountered Person A outside the Premises, she was combative. She explained to Person A that Con Ed was going to turn off the electricity and asked if they could enter in order to either see and/or remove the panel (T. 108). Person A replied, "I pay the bill," to which Respondent Lodico did not respond (T. 109). At that point, several dogs ran out of the Premises but the police officers present caught them and returned them to Person A's custody. Person A put the dogs back inside the Premises and "tied them up" so they would not escape; she then held the door open for the police officers and allowed them inside (*Id.*). According to Respondent Lodico, Person A told her that she could "go find it," referring to the electrical panel (T. 110). As she made that statement to Respondent Lodico, she was standing in the front doorway of the Premises holding the door open (*Id.*). Respondent Lodico denied that Person A had ever attempted to block her path or told her that she could not come inside (*Id.*).

When Respondent Lodico entered the Premises, she encountered Stephanie Forbes, standing between the kitchen and the living room, but did not speak to her (T. 110-111). She remained inside the Premises for approximately 15 minutes while Con Ed workers sealed the meter housing (T. 111-112).

On cross-examination, Respondent Lodico conceded that she planned the January 31st visit to the Premises with Cod Ed approximately two weeks earlier but that she did not make an application for a search warrant during that period (T. 114-115). She conceded further that there were individuals inside the premises when she first knocked on the door, but that they did not come outside until after Person B had been arrested; that Person C was arguing with the police officers when Person A came outside; that Person D was arrested in Person A's presence; and that Person A was visibly upset (T. 116, 118, 119). Respondent further conceded that Person A protested the arrests, arguing that the police had "no right to do that" (T. 123). Finally, while Respondent Lodico conceded that there was a child inside the premises, she testified that she could not recall whether the child was crying⁶ (T. 122).

Respondent Lodico asserted that she had asked Person A for permission to enter the Premises but denied telling her that Con Ed "needed" to come inside. She testified that while she did not remember the precise language she used, she was informed by Con Ed workers at the scene that they did not need to enter the Premises in order to shut off the electricity⁷ (T. 124).

⁶ Respondent Lodico acknowledged that she had made an earlier statement to CCRB in which she asserted that the child she observed inside the Premises was crying (T. 122).

⁷ Respondent Lodico acknowledged that she had made an earlier statement to CCRB in which she responded to the question, "Okay. And was it you who said that Con Ed needed to go in the house?" by answering, "Yes. I told them that they had to come in and read the meter and they want a police escort" (T. 125).

Respondent Sykora testified that when he saw Respondent Lodico at the 105th Precinct at about 1000 hours on January 31st, she informed him that she was going to the Premises; he then went to his office for a short time before proceeding to the Premises with Police Officer Crescimanno (T. 56, 88). Upon his arrival, he saw the Anti-Crime team, the Anti-Crime supervisor, Sergeant Reilly, two Con Ed workers and Respondent Lodico (T. 57). Respondent Sykora approached the Con Ed workers and asked if they needed anything; they replied that they would like to have a police escort if they were able to enter the Premises (T. 57-58).

As Respondent Sykora engaged in the aforementioned conversation, Person B drove up to the Premises. He observed the Anti-Crime team walk over to Person B's car and place him under arrest (T. 58). He also observed Person C get out of the car and protest the arrest, stating, "You can't do this to him; I'm a court officer" (*Id.*). Respondent Sykora approached Person C and attempted to calm her, but she continued arguing with him until she "chest-bumped" him (T. 59). At that point, he directed Respondent Lodico and Police Officer Levy to place her under arrest (*Id.*).

Respondent Sykora then saw Person A, whom he described as a woman wearing a neck brace, emerge from the Premises (T. 60). He advised Person A that Con Ed was there to shut the power off; he denied threatening to arrest her or having any further conversation with her (*Id.*, 80). When he spoke to Person A, she was standing in the front yard of the Premises behind a fence and he was on the opposite side of the fence (*Id.*, 77-78). He then returned to his vehicle and entered it, where he addressed other police business (T. 61, 83-84). He denied ever entering the Premises or directing Respondent Lodico to do so (*Id.*). He acknowledged that while he was superior to Respondent Lodico in rank, her direct supervisor was Sergeant Riley (*Id.*). Respondent Sykora was later advised by Police Officer Cruscimanno

that the stove was on inside the Premises and that the occupants had apparently been using it for a heat source (T. 62). Cruscimanno also advised him that the occupants had "jumped the meter," meaning that they had devised a means of establishing a connection in the absence of a Con Ed meter which allowed them to obtain electric power without establishing an account with Con Ed (*Id.*). Respondent Sykora then left the location of the Premises and returned to the 105th Precinct (*Id.*).

Respondent Sykora acknowledged that he had the authority to issue orders to Respondent Lodico and, in fact, issued one to her to place Person C under arrest (T. 63). He testified that it was his understanding that Respondent Lodico had obtained Person A's consent to enter the Premises (T. 65). Respondent Sykora affirmed that if he believed that Respondent Sykora was about to effect an unlawful entry, it would have been his obligation as a supervisor to instruct her to refrain from doing so (T. 67-68). He further acknowledged that Person A was yelling from the time she stepped outside the Premises until Person D was placed under arrest (T. 75-76).

CCRB called Stephanie Forbes as a witness. Ms. Forbes testified that on January 31, 2017, she resided at the Premises with her fiancé⁸, Person B and her nine-year old son (T. 15, 16). Ms. Forbes testified that Person D, Person D's girlfriend Person A and two other individuals resided at the Premises (T. 16). According to Ms. Forbes' understanding, Person A was the tenant at the Premises (T. 17).

At approximately 1000 hours on January 31st, she was at the Premises with Person A, Person D and her son (*Id.*). At about that time, she observed a Con Ed van outside;

⁸

At various points in her testimony, Ms. Forbes refers to [REDACTED] as her "husband," [REDACTED] as her "sister-in-law," and Person C, his mother, as her "mother-in-law."

approximately ten minutes later, she observed a black unmarked police car pull up behind the van (*Id.*, 21). According to Ms. Forbes, she heard banging on the door and saw two plain clothes police officers on the porch; the noise startled her son, who ran upstairs (*Id.*). Ms. Forbes followed her son upstairs to check on him; from the second floor, she observed Person B's car drive up to the Premises; saw two police cars "corner" his car; and watched as he was placed under arrest (T. 19, 20). She also saw Person C in the same vehicle (*Id.*).

Ms. Forbes returned to the main floor approximately five minutes later and saw the police officers and two Con Ed workers in the living room (*Id.*, 21). She asserted that Person A left the police officers to "get papers" proving that they had a legal right to remain on the Premises until March; she also asserted that Respondent Lodico told her that if her son were not present that she would "lock [her] up too" (T. 24). According to Ms. Forbes, Person A told the police officers, "We have a right to stay here," but they did not examine the papers and proceeded to the basement (T. 25). Ms. Forbes asked one of the police officers if she could go to the police car to speak with her fiancé; when she did so, she observed that Person C and Person D had also been placed under arrest (T. 27). She denied that she gave any police officer permission to enter the Premises and did not hear anyone else on the Premises grant permission to enter (T. 28).

On cross-examination, Ms. Forbes asserted that she did not know the name of the owner of the Premises and claimed that Person A had leased the Premises (T. 29). Ms. Forbes further claimed that she paid a portion of the rent, but did not contribute to any utility bill (*Id.*). She denied being aware that anyone on the Premises was obtaining electric power unlawfully (*Id.*). Ms. Forbes conceded that she did not know what discussion, if any, was had between the police officers who entered the Premises and Person A during the time that she was

upstairs with her son (T. 35). Finally, Ms. Forbes conceded that she became aware of a court order which gave the occupants until March to leave the Premises, but further claimed that she never asked Person A why they had to leave (T. 44-46).

CCRB offered the recorded statement of Person A, accompanied by a transcript of her statement, in evidence as CCRB Exhibits 1a and 1b. In her statement, Person A asserted that on January 31, 2017, at approximately 1000 hours, she was inside the Premises (CCRB Ex. 1, p. 3). At about that time, she woke up, then went to the bathroom. As she exited the bathroom, she heard police officers saying they were going to "cut off" her lights. She observed Con Ed personnel and described the police actions as harassment, but claimed not to have been bothered by it. Approximately 15 minutes later, her "brother-in-law," Person B, drove up to the Premises but the police officers "bombarded him from a block away" (*Id.* at 3-6, 29, 30). According to Person A, the police took him from his car and placed him in a police car for no reason. Person C, whom Person A described as her "m[an] [redacted]" was also a passenger in Person B's vehicle and she stepped from it after he was arrested (*Id.* at 32). Person A asserted that Person C began to make a scene because Person B was her son.

At that point, Person A stated that she stepped out of the Premises to show the police officers "the paper," referring to the court order entered into evidence as CCRB Exhibit 2, but that the police officers claimed that they didn't care about it. Person A claimed that after she told the police officers that they were on property that didn't belong to them, they brought up the fact that Person A was not supposed to be at the Premises and had to depart by January 30th or 31st. She asked them how they knew that without her mentioning it to them; she then concluded that they had been corresponding with the landlord, [redacted] (*Id.* at

36-copy of the order, then Person A's "b" [REDACTED] merged from the Premises and told the police officers to take him instead of his brother. Person D was then placed under arrest after being frisked. Person C continued to protest the arrests of her sons, asserting that they had done nothing. Person A claimed that after a police officer falsely asserted that Person C had touched him, she was placed under arrest (*Id.* at 39-40). According to Person A, as she continued to protest the arrests of Person D and Person B as unnecessary, Respondent Lodico told her that she could go to jail with them (*Id.* at 79). Person A claimed that as she attempted to go back inside the Premises, Respondent Lodico "ran up on [her], pulled [her] arm," and "almost made [her] fall down the steps." According to Person A, the police "basically bombarded inside the house, avoided the court order, and . . . went in and cut off everything" (*Id.* at 3-6, 10).

When questioned about how the police officers came to enter the premises, Person A claimed that the police officers were trying to push her out of the way and that there was nothing that she could do because Respondent Lodico "already had her cuffs out, so if I was really trying to -- you know she would have just locked me up and went right in basically . . ." She claimed that the police officers brushed against her as they walked past her into the Premises, asking "Where is downstairs; where does the electricity come from?" According to Person A, she replied "I don't have to tell you anything; you can go and look for yourself." She later clarified that she went inside first, then two male officers, a Con Ed worker and Respondent Lodico followed her (*Id.* at 71-73). Person A claimed that she tried to keep the police from entering, but Respondent Lodico "looked like she wanted to arrest" her and she needed to be at liberty in order to post bail for the three individuals who had just been arrested. Person A stated that she "might just let them proceed" (*Id.* at 97-98). Person A

asserted that Respondent Lodico and another police officer held the front door handle to prevent her from closing it behind her as she attempted to re enter the Premises (*Id.* at 98).

Few things are more difficult, yet more fundamental to the role of a trier of fact, than attempting to reconstruct past events on the basis of opposing accounts. In a hearsay case of this nature, particular attention must be paid to the evidence. This Tribunal has held many times that while hearsay is admissible in administrative proceedings, and may be the sole basis for a finding of fact, it must be carefully evaluated before it is relied upon. The more important the evidence is to the case, the more critically it should be assessed (*Police Department v. Acosta*, OATH Index No. 464/00 [Jan. 7, 2000]). Factors such as corroboration, consistency, bias, logic and the degree to which an account comports with common sense and general human experience must be taken into account (*Maloney v. Suardy*, 202 A.D.2d 297, 609 N.Y.S.2d 179 [1st Dep't 1994]).

In her statement, Person A made the blanket assertion that "cops are crooks" (CCRB Ex. 1, p. 76). She also accuses the police officers of conspiring with the landlord/owner and describes the actions taken on January 31st as a "setup" (CCRB Ex. 1, p. 6, 36, 48). She confesses an erroneous interpretation of the January 19, 2017, court order as stating that the police officers "could not come on the premises at all" (CCRB Ex. 1, p. 6, 57, 60). She also accuses the police officers of threatening to shoot her dogs, which if true, would be relevant evidence regarding the voluntariness of her consent (CCRB Ex. 1, p. 25, 28). When Person A was asked by the CCRB investigator for contact information for Person D or Person B, she claimed that they had changed their telephone numbers, but acknowledged that they were living in [REDACTED] with Person C (CCRB Ex. 1, pp. 108-109). Person A then asserted that she only provided herself and Stephanie Forbes as witnesses for CCRB because the other individuals did not want to be involved (CCRB Ex. 1, p. 110).

While Person A's statement meets the threshold criteria for admissibility in this forum, it also raises substantial issues of bias. Based upon her: (1) assertion of collusion between the police officers and her landlord; (2) her disparaging characterization of police officers generally; and (3) her reluctance to provide CCRB access to other percipient witnesses to the events in question, the Tribunal finds that her narration of the relevant aspects of the encounter with Respondents has limited probative value, the exceptions being factual assertions which were corroborated by other credible evidence or admissions.

Similarly, Ms. Forbes' testimony has limited probative value, as she confessed she did not witness the verbal exchange between Person A and Respondent Lodico at the front door; the rest of her testimony is comprised of facts which are not in dispute. In addition, her assertion that she never asked Person A why they had to leave the premises is dubious, casting doubt upon her veracity. In the view of the Tribunal, the prospect of being displaced from one's abode is such a shocking turn of events for most individuals that her professed lack of curiosity about the reasons for the displacement does not ring true.

In contrast, the respective testimonies of both Respondents appeared to be forthcoming, logical and consistent with other evidence in the case. In particular, Respondent Lodico's willingness on cross-examination to express uncertainty with respect to the answers to certain questions put to her and her ready concessions that she made earlier out-of-court statements with which she was confronted strongly suggest that she was being candid with the Tribunal.

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Specifications 1, 2: Unlawful Entry, Search

Based upon the credible evidence in the record, I find that CCRB has failed to meet its burden of proof by a preponderance of the credible, relevant evidence that Respondent Lodico

entered and searched the Premises without legal authority and that Respondent Sykora participated in said entry and/or search.

Under federal and state law, a person has a right to be free from unreasonable searches and seizures (Fourth Amendment, U.S. Constitution; Art. 1, sec. 12, New York State Constitution). The Supreme Court has held that a warrantless entry into a home does not violate the Fourth Amendment if the officers obtain voluntary consent from the individual whose property is searched or from a third party who possesses common authority over the premises (*Illinois v. Rodriguez*, 497 U.S. 177 [1990]). In this case, it is undisputed that Respondents did not have a search warrant. There is no evidence in the record that there were exigent circumstances surrounding Respondents' entry into the Premises; thus, the only means of lawfully entering would have been with Person A's consent. Person A appears to have had the authority to consent to an entry into the Premises as implied by her limited right to continue occupying the premises until January 31, 2017 (CCRB Exhibit 2).

Respondents have argued that Person A's statement, "You can go and look for yourself," is credible evidence of her consent to their entry and eventual search of the Premises (Tr. 133). Respondent Lodico corroborated this statement, testifying that as she stood in the doorway of the Premises, Person A told her "We could go find it" (T. 110). CCRB has argued that any putative consent given by Person A was involuntary because the circumstances of her encounter with Respondents were coercive. CCRB took the position at trial that she was coerced by: (1) witnessing the arrest of three individuals on the premise; (2) being threatened with arrest by Respondent Sykora; and (3) being told by Respondent Lodico that Con Ed needed to enter, in a declarative statement, rather than an interrogatory in which she sought permission to enter.

At the outset, I find that there is no credible evidence that Respondent Sykora ever participated in the entry or search of the Premises. He denied doing so in his testimony and the physical descriptions offered by Person A in her statement were insufficiently detailed to identify him as one of the officers who did enter. Furthermore, there is no reasonable interpretation of the evidence which would permit the Tribunal to find that he supervised the entry and search, particularly because Respondent Lodico's direct supervisor, Sergeant Reilly, was present on the scene.

By offering Person A's statement in evidence, CCRB has conceded that the assertion she made therein that she told Respondent Lodico to "go ahead and look for yourself," was made; I find that Respondent Lodico could have reasonably construed that statement as consent for the officers to enter the home. At issue is whether her consent was freely given or coerced. On the one hand, coercion can be "express or implied" (*Schneckloth v. Bustamonte*, 412 U.S. 218, 227 [1973]). Factors such as suspects being placed under arrest, having family members removed from the scene, and seeing a large group of law enforcement agents at the scene all militate against a finding of voluntary consent (*People v. Gonzalez*, 39 N.Y.2d 122, 130-131 [1976]). Indeed, "although not totally dispositive, an important factor in determining whether consent is voluntarily given is whether the defendant is in custody at the time consent had been given" (*People v. Jones*, 118 A.D.2d 86, 95 [1st Dept 1986]). On the other hand, in the absence of any display of physical force or handcuffs, cooperation has been found to be voluntary (*People v. Entzminger*, 163 A.D.2d 138, 141 [1st Dept 1990]). Moreover, telling a suspect that he "wasn't necessarily going back to jail" was found not to be an implicit threat that he would go to jail if he did not give consent (*People v. Mercado*, 120 AD3d 441, 444 [1st Dept 2014]).

First, the only evidence of a threat by Respondent Sykora to Person A is the self- serving assertion she made to that effect, contained in her hearsay statement. Second, CCRB has offered no support in law for the proposition that any putative consent which is preceded by multiple arrests is *per se* involuntary. Indeed, the fact that persons were arrested in Person A's presence is only a factor in determining whether her consent was voluntary. While witnessing the arrest of a family member could be upsetting, the arrests themselves were not of such character that a disinterested person would have been shocked. Third, CCRB's argument that Person A's will was overcome by the mere inflection of Respondent Lodico's voice is belied by the objectively confrontational posture she adopted, according to her own description of the events.

Person A emerged from the Premises protesting the arrests of Person B and Person C using the words, "You have no right . . ." When Respondent Lodico asked for consent to enter, Person A countered that the police "had no right" to be on the Premises because she had a court order, which she displayed. When Respondent Lodico responded that Person A had been ordered to vacate the premises, Person A's reaction was to question her as to the basis of her knowledge that Person A had an eviction date. An objective assessment of Person A's demeanor would lead to the conclusion that she had no hesitation to assert what she believed to be her rights, albeit, mistakenly. In fact, when she told Respondent Lodico to "go ahead and look for yourself," she was rebuffing Lodico's question asking where the electrical panel was.

Person A's assertion that she thought she would let the officers inside because Respondent Lodico "looked like she wanted to arrest [her]" is conclusory and cannot be credited without the opportunity to test it during live testimony.

In light of the foregoing, there is at least ambiguity as to whether the entry was constitutional in the instant matter. This Tribunal does not, however, need to reach a conclusion about the constitutionality of the entry in order to decide whether Respondents committed misconduct. A search can be unconstitutional without the officers' conduct exposing them to liability (*see Malatesta v. New York State Div. of State Police*, 120 F. Supp. 2d 235 [NDNY 2000] and *People v. Malatesta*, 186 Misc 2d 312 [Sup Ct, Rensselaer County 1999]). In these cases, police were acting as "civil standby" during a civil repossession when they found possible evidence of a crime and obtained a search warrant, leading to the discovery of stolen property. The evidence was ultimately suppressed at the trial level as "fruit of the poisonous tree." Defendant police officers, however, were found to have immunity from civil rights claims because there was reasonable ambiguity about the limits of the civil standby role. In other words, if officers could reasonably believe they were acting to keep the peace in a civil matter, they were immune from liability for entering the property.

In this case, the relevant, credible evidence supports a finding that Respondents had a reasonable basis to accompany the Con Ed workers in a good-faith effort to protect them as they entered a potentially dangerous environment. One resident apparently gave consent, regardless of whether that consent would be adequate to avoid the suppression of evidence at a criminal trial. For that reason, I find that Respondent Lodico did not abuse her authority by entering and searching the home.

Based upon the foregoing, I find there is no credible evidence that Respondent Sykora ever participated in entering the Premises or searching it; I therefore find Respondent Sykora Not Guilty of Specifications 1 and 2 of Disciplinary Case 2018-18668. I further find by a preponderance of the credible, relevant evidence that Person A voluntarily consented to the

entry of Respondent Lodico and the Con Ed workers. Accordingly, I find Respondent Lodico Not Guilty of Specifications 1 and 2 of Disciplinary Case No. 2018-18669.

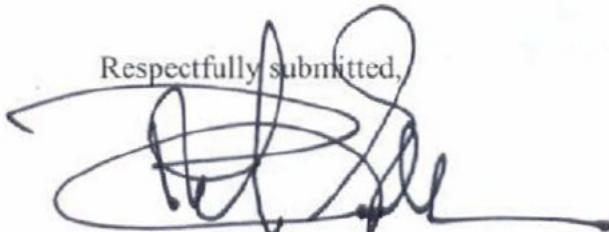
Disciplinary Case No. 2018-18668

Specification 3: Threat to Arrest

I find that CCRB has failed to meet its burden of proof by a preponderance of the relevant, credible evidence that Respondent Sykora made a threat to arrest Person A without sufficient legal authority. As set forth above, the only evidence that Respondent Sykora made such a threat is the assertion Person A made in her hearsay statement. The Tribunal has previously made a credibility finding with respect to Person A which addressed her obvious bias. While Ms. Forbes alleged that Respondent Lodico made a similar threat to arrest her, she did not testify that anyone made a threat directed at Person A.

Based upon the absence of credible evidence that such a threat was made, there is no need to analyze whether such threat would have been, under the circumstances, without sufficient legal authority. Accordingly, I find Respondent Sykora Not Guilty of Specification 3.

Respectfully submitted,


Paul M. Gamble
Assistant Deputy Commissioner Trials

APPROVED

